IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 32129

BRETT A. HARWOOD,	)	**2008 Unpublished Opinion No. 416**
	)	
Petitioner-Appellant,	)	**Filed: April 2, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
STATE OF IDAHO,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Respondent.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Elmore County. Hon. Michael E. Wetherell, District Judge.

Order summarily dismissing application for post-conviction relief, affirmed.

Brett A. Harwood, Littlefield, Texas, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

Brett A. Harwood appeals from the district court's order summarily dismissing his application for post-conviction relief. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Harwood pled guilty to sexual battery of a minor child sixteen years of age. I.C. § 18-1508A(1)(a). At Harwood's change of plea hearing, he admitted to having sexual intercourse with his oldest daughter. In exchange for Harwood's guilty plea, the state agreed not to file additional charges related to inappropriate sexual contact Harwood was alleged to have engaged in with his younger daughter. The district court accepted Harwood's plea, and he was sentenced to a unified term of twenty-five years, with a ten-year minimum period of confinement. Harwood filed an I.C.R. 35 motion for reduction of sentence, which the district court denied. Harwood appealed his sentence and the denial of his Rule 35 motion. In an unpublished opinion,

this Court affirmed Harwood's sentence and denial of his Rule 35 motion. *See State v. Harwood,* Docket No. 27632 (Ct. App. Feb. 5, 2002).

Harwood, through an attorney, filed an application for post-conviction relief and an affidavit in support thereof. The state responded with an answer, a motion for summary dismissal, and a memorandum in support of the state's motion for summary dismissal. The district court filed a notice of intent to summarily dismiss Harwood's application. Harwood did not respond, and the district court summarily dismissed his application, determining that Harwood's allegations were belied by the information contained in the record. Harwood, now appearing pro se, appeals the district court's order summarily dismissing his post-conviction application.[1]

Harwood's pro se appellate brief contains numerous claims. Harwood's claims are primarily couched in terms of ineffective assistance of counsel and fall into three different categories. Therefore, his claims will be addressed accordingly.

II.
STANDARD OF REVIEW

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than "a short and plain statement of the claim" that would suffice for a

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[1] Harwood's pro se brief includes a request for "new appointed appeals conflicts attorney." We note that Harwood was assisted by counsel in the preparation of his post-conviction application and supporting affidavit. On appeal, Harwood was originally appointed the State Appellate Public Defender, who was allowed to withdraw from representation. If an applicant for post-conviction relief alleges facts that raise the possibility of a valid claim and counsel could aid the applicant in properly alleging the necessary supporting facts, counsel should be appointed. *Rios-Lopez v. State*, 144 Idaho 340, 342, 160 P.3d 1275, 1277 (Ct. App. 2007). However, because Harwood's application does not allege facts that raise the possibility of a valid claim, we conclude that he is not entitled to the appointment of post-conviction appellate counsel to aid him in this appeal.

complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code Section 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file; moreover, the court liberally construes the facts and reasonable inferences in favor of the nonmoving party. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the

burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177. This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

III.

ANALYSIS

A. Claims Not Raised Before the District Court

Harwood's first category of claims consists of those numerous claims that were not raised before the district court in his application but, rather, are presented for the first time in his pro se appellate brief. These claims include, but are not limited to: Harwood's waiver of his rights to silence and counsel before the police interrogation was not knowingly and intelligently made; Harwood's attorney failed to file a direct appeal; Harwood's due process rights were violated; Harwood's Fifth Amendment rights were violated when he was forced to participate in the presentence investigation and the psychosexual evaluation upon "threat of retaliation through additional sentences;" Harwood's attorney did not accompany him to the presentence investigation or the psychosexual evaluations; Harwood's attorney did not review the PSI report or psychosexual evaluation with him; Harwood's attorney did not contest the victim making a private statement to the district court at the bench at sentencing; Harwood's attorney did not object to his wife's statement that he should get the maximum penalty; and Harwood's post-conviction counsel did not file a brief explaining the claims in his application. Generally, issues not raised below may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). Therefore, we decline to address these issues presented for the first time in Harwood's appellate brief.

B. Claims Belied By the Record

Harwood's second category of claims includes claims that are belied by the record. The district court's notice of intent to summarily dismiss Harwood's post-conviction application addressed each of the claims Harwood raised in his application and affidavit. The district court

discussed Harwood's allegations and compared them to what is contained in the record and the transcripts from Harwood's various hearings. The district court concluded that Harwood's "contentions are directly contradicted and undermined by the copies of the transcripts of several hearings [Harwood] participated in." Harwood did not respond to the notice of intent to dismiss with any further admissible evidence; however he continues to assert these same claims in his appellate brief.

1. Consequences of pleading guilty

Harwood asserts that he did not know the possible consequences of his guilty plea and, therefore, his plea was invalid. However, at the change of plea hearing, Harwood correctly acknowledged that the maximum possible punishment for the offense of sexual battery of a minor was life in prison. The district court then informed Harwood of the additional consequences, explaining:

> Also, you would have to register as a sex offender for that offense. That's an additional consequence. You lose your right to keep and bear arms. You give up your right to vote, to serve on jury duty, to hold public office. The Court in this case could order restitution to the victim, court costs and fees and public defender reimbursement.

In addition to discussing the sentence ramifications, the following colloquy between the district court and Harwood occurred:

> THE COURT: Now, do you understand that by pleading guilty you are giving up your constitutional right to a trial by a jury?
> THE DEFENDANT: Yes.
> THE COURT: You are giving up your presumption of innocence?
> THE DEFENDANT: Yes, sir.
> THE COURT: You are giving up your right to require that the State prove your guilt as to each element of this charge beyond a reasonable doubt?
> THE DEFENDANT: Yes, sir.
> THE COURT: You are giving up your right to see, hear, and to confront your accusers?
> THE DEFENDANT: Yes, Your Honor.
> THE COURT: By pleading guilty, you are giving up your right to remain silent. At your trial, you don't have to testify. The State can't make you testify or comment that you don't take the witness stand. You are giving that up by pleading guilty. Do you understand that?
> THE DEFENDANT: Yes, Your Honor.
> THE COURT: By pleading guilty here today you are waiving any defenses that you may have had to this charge. You are giving them up.
> THE DEFENDANT: Yes.

THE COURT: You are giving up any claim that this court or the lower courts up to this point haven't treated you fairly.
THE DEFENDANT: Yes, sir.
THE COURT: Do you understand that?
THE DEFENDANT: Yes, I do.

The district court asked Harwood if he understood his plea and whether he had any questions for the court or his attorney. Harwood acknowledged, again, that he understood what he was doing by pleading guilty and that he had no questions. Harwood's claim that he did not know the consequences of his guilty plea is baseless and belied by the record.

2. Complaint and information

Harwood's affidavit alleges that he was not allowed to see the information or the complaint filed in his case. It also alleges that Harwood believes his attorney acknowledged at the change of plea hearing that he had not gone over the information with him. With regard to the information, the following exchange took place:

THE COURT: All right. Have you and your counsel had an opportunity to read that information? Is this the first time you have seen the information?
[COUNSEL]: Yes, Your Honor.
THE COURT: Mr. Harwood, do you read, write, and understand the English language?
THE DEFENDANT: Yes, sir.
THE COURT: All right. I'll certainly give you an opportunity to review that.
(Pause in the proceedings.)
[COUNSEL]: We're ready to proceed, Your Honor.
THE COURT: You have had a chance to read the information?
[COUNSEL]: Yes.
THE COURT: Have you, Mr. Harwood?
THE DEFENDANT: Yes.
THE COURT: Does Mr. Harwood wish to have that information read here in open court?
[COUNSEL]: He would waive the reading of that, Your Honor.

This conversation shows that Harwood was given a chance to review the information.

A review of the transcript from Harwood's arraignment hearing also demonstrates that the district court began the proceedings by reading Harwood the complaint filed against him. Harwood's assertions regarding the complaint and the information in his case are belied by the record. Furthermore, Harwood has not alleged any prejudice that was caused by his attorney's

alleged failure to review the complaint or the information with him. Therefore, the district court properly dismissed these claims.

C. Conclusory Claims Unsupported by Evidence or Allegations of Prejudice

Harwood's final category includes conclusory claims that are unsupported by admissible evidence and that Harwood failed to allege how they prejudiced his case.

1. Voluntariness of the guilty plea

Harwood contends that his guilty plea was not entered knowingly and voluntarily. Specifically, he contends that the withdrawal symptoms he was experiencing from drug and alcohol abuse precluded him from entering a knowing, intelligent, and voluntary plea. Harwood also contends his attorney was ineffective for not observing and reporting on Harwood's mental condition and asking the court to "delay action on [his] charges until [he] would be able to participate 'knowingly, intelligently and voluntarily.'" The state counters by arguing that Harwood has shown no error in the district court's summary dismissal of these claims because they are affirmatively disproved by the record.

Harwood's claim that his drug and alcohol withdrawals precluded him from entering a knowing, intelligent, and voluntary plea is unsupported by admissible evidence and belied by the record. The transcripts from all of Harwood's appearances before the district court show that Harwood understood the proceedings and was pleading guilty of his own accord. Harwood told the district court that he "decided to plead guilty when [he] was talking with [the] Detective." At his sentencing hearing, Harwood indicated that there were no psychological or mental problems that might have a bearing on his case. Harwood has also not presented any admissible evidence linking his lack of alcohol and drugs while incarcerated to a mental state making it impossible for him to enter a competent guilty plea. *See Cooper v. State*, 96 Idaho 542, 548, 531 P.2d 1187, 1193 (1975) (holding that, where a post-conviction applicant alleges an involuntary guilty plea without presenting evidence of material fact in support of the claim, the district court acts properly in summarily dismissing the claim). Therefore, Harwood's claims regarding his withdrawal from alcohol and drugs affecting his plea are unsupported, as well as belied by the record.

Harwood claims his attorney was ineffective for failing to delay court proceedings until he had recovered from his alleged withdrawal symptoms. However, Harwood does not assert that he told his attorney he was suffering from withdrawal symptoms. Additionally, Harwood's

bare allegation that his "mind was put into a state of confusion by the sudden substance withdrawal, making it very hard to judge what would be right or wrong to do" is unsubstantiated by any evidence and contrary to the coherent answers he gave to the court at his various hearings. Therefore, we conclude that the district court properly summarily dismissed Harwood's claim that his plea was involuntary and his ineffective assistance claim related to the alleged involuntariness of his plea.

2. Ineffective assistance of counsel

Harwood's brief presents a variety of claims alleging that he received ineffective assistance of counsel and, more specifically, his application alleges, in part:

> Counsel for Petitioner failed to adequately investigate the case and failed to adequately communicate with Petitioner regarding the nature of the charges. That counsel for the Petitioner failed to present any evidence in mitigation and failed to adequately address any discrepancies presented by the prosecution in their presentation at sentencing on May 7, 2001.

Determining whether an attorney's pretrial preparation falls below a level of reasonable performance constitutes a question of law, but is essentially premised upon the circumstances surrounding the attorney's investigation. *Gee v. State*, 117 Idaho 107, 110, 785 P.2d 671, 674 (Ct. App. 1990). To prevail on a claim that counsel's performance was deficient in failing to interview witnesses, a defendant must establish that the inadequacies complained of would have made a difference in the outcome. *Id.* at 111, 785 P.2d at 675. It is not sufficient merely to allege that counsel may have discovered a weakness in the state's case. *Id.* We will not second-guess trial counsel in the particularities of trial preparation. *Id.*

Harwood does not specify any aspect of "the case" that his attorney was deficient in investigating, nor does Harwood suggest what investigation his attorney should have pursued. Furthermore, Harwood has presented no evidence of what witnesses should have been called, their testimony, or how calling witnesses, investigating, or communicating would have changed the outcome of his case. Harwood's claims regarding deficient investigation and communication are mere conclusory allegations unsupported by any admissible evidence and fail to address the prejudice prong of *Strickland*. Therefore, Harwood's assertions regarding failure to investigate and failure to communicate were properly dismissed.

Harwood's affidavit alleges that his attorney was ineffective for failing to discuss discovery and police reports with him and generally ineffective for failing to spend time with

him on his case. Again, Harwood has failed to allege how these "deficiencies" in his attorney's performance prejudiced his case. Harwood has not alleged how reviewing police reports or discovery with his attorney or spending more time with his attorney would have affected the outcome of his case. Therefore, Harwood has failed to meet the prejudice prong of *Strickland*, and these claims were properly dismissed by the district court.

Harwood does not specify what evidence his attorney should have presented in mitigation at his sentencing, nor does Harwood specify what discrepancies presented by the state his attorney should have addressed. Furthermore, at the sentencing, Harwood's attorney argued:

> Judge, in this case, Mr. Harwood did plead guilty to the offense straight up with no plea agreement, which indicates, in my opinion, a lot of responsibility, and, as far as responsibility goes, Mr. Harwood has made no--has never hesitated to tell me that he did not wish to go to trial on this case or raise any defenses that he may or may not have had, but he was mostly concerned about the impact that it would have on his daughter to bring this to a public trial where she would be forced to testify. That's always been his greatest concern in this case.
>
> He felt like a trial would revictimize the victims. He was very adamantly opposed to that idea, and the state did offer this agreement. There was no recommendation in that, but Mr. Harwood pled guilty and took full responsibility for his actions, knowing that the court did have the power to impose a life sentence in this case with no particular recommendation from the state.
>
> So, I think it's pretty clear that he has put his entire life on the line for the purposes of taking responsibility here.

Harwood has not set forth what evidence his attorney should have presented in mitigation in addition to this argument. Once again, Harwood's claims regarding deficient performance at his sentencing hearing are mere conclusory allegations unsupported by admissible evidence and fail to address the prejudice prong of *Strickland*. Therefore, the district court was correct in summarily dismissing them.

Harwood alleges his attorney told him that he would be sentenced to seven years, with a minimum period of confinement of three years, but that his sentence would be suspended and he would be placed on a 180-day period of retained jurisdiction. In his affidavit, Harwood contends his attorney told him that he "would *probably* get a six month rider if [he] changed [his] plea and had promised to [him] that the Court would *likely* impose a rider and counseling on [him] rather than the sentence that was imposed." (Emphasis added).

An inaccurate prediction by counsel as to the sentence a convicted individual could receive from the trial court is not grounds for post-conviction relief. *Sanchez v. State*, 127 Idaho

709, 712, 905 P.2d 642, 645 (Ct. App. 1995). *See also Walker v. State*, 92 Idaho 517, 521, 446 P.2d 886, 890 (1968) (holding that an alleged assurance of leniency at sentencing by counsel does not constitute grounds for post-conviction relief). Even assuming that Harwood's attorney made the statement about his sentence, Harwood's affidavit demonstrates that his attorney was merely predicting a possible sentence. In addition, Harwood has failed to demonstrate prejudice.

When the court explains that sentencing is in its discretion, a post-conviction applicant cannot demonstrate prejudice by merely showing his or her attorney offered an inaccurate sentencing prediction. *Doganiere v. United States*, 914 F.2d 165, 168 (9th Cir. 1990). Even if we accept as true that Harwood's attorney made the sentence prediction, the record demonstrates that the district court corrected any misconception and, before pleading guilty, Harwood acknowledged the maximum penalty for his crime was life in prison. Furthermore, the record also demonstrates that the district court informed Harwood that "the only recommendations before the Court here is that the State is not going to charge any more charges against you." Therefore, even if Harwood's attorney inaccurately predicted Harwood's sentence, Harwood has failed to demonstrate that the alleged prediction prejudiced him because before pleading guilty he was informed that he could receive up to life in prison.

Harwood's brief sums up his claims, arguing that "the fact is that the appellant's attorneys from pre-trial through the appeal on postconviction (sic) have consistently refused and/or neglected to pursue some of the valid issues that I believe should have been brought to the fore in my case, and that several of my rights to due process have been violated." Much like Harwood's other conclusory allegations, this general statement does not allege facts that raise the possibility of a valid claim, nor does it specify what valid issues Harwood believes his counsel should have pursued or why he was prejudiced by his counsel's alleged failures to pursue them.

"The constitutional requirement for effective assistance of counsel is not the key to the prison for a defendant who can dredge up a long series of examples of how the case might have been tried better." *Ivey v. State*, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992). In this case, Harwood has alleged many examples with which he attempts to demonstrate that he received ineffective assistance of counsel. However, this Court has examined Harwood's assertions and concludes that all of Harwood's claims are without merit. Specifically, Harwood's claims are raised for the first time on appeal, are belied by the record, or are mere conclusory allegations unsupported by admissible evidence. Additionally, Harwood has failed to demonstrate how he

was prejudiced by any of the alleged deficiencies of his counsel and, therefore, has failed to meet his burden under *Strickland*.

IV.

CONCLUSION

Reasonably construing the facts and allegations in Harwood's favor, we conclude his claims fail to raise a genuine issue of material fact. Therefore, the district court's order summarily dismissing Harwood's application for post-conviction relief is affirmed. No costs or attorney fees are awarded on appeal.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**